
*Compliance and Enforcement
Subgroup Report*

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1.0 Introduction

Pursuant to DC Law 12-268, the "Equal Opportunity for Local, Small, and Disadvantaged Business Enterprises (LSDBE) Act of 1998," each agency of the District of Columbia government is required to allocate 50 percent of construction contracts to certified small business enterprises; allocate 50 percent of its procurement of goods and services to certified small business enterprises; and allocate 5 percent of its contracts to prime contractors that agree to subcontract a portion of the work to certified local/disadvantaged business enterprises. This Report focuses on the current compliance and enforcement process related to this requirement and identifies opportunities to strengthen them.

2.0 Statutory Framework and Program Expectations

The Office of Local Business Development (OLBD) is charged with the responsibility of monitoring agency compliance with the requirements of DC Law 12-268 in a race and gender neutral way. In order to facilitate compliance monitoring, OLBD requests that District agencies submit a series of documents, including, an Annual Budget Allocation Letter, an Expendable Procurement Projection Report, an Operating Expenses Checklist, and Quarterly Reports. At the end of each fiscal quarter, the OLBD compiles the quarterly expenditure reports and files them with the Office of the Mayor and the Council of the District of Columbia.

Pursuant to DC law 13-169, the Equal Opportunity for Local, Small and Disadvantaged Business Enterprises Amendment Act of 2000, agencies that fail to meet their goal could jeopardize their contracting authority. The Office of Local Business Development is authorized under the above referenced law to reserve contracts, or parts thereof, until the agency's failings have been remedied.

OLBD also reviews and approves Affirmative Action Plans submitted by District agencies for public/private partnerships and for contractors with contracts in excess \$25,000. In addition, through Memoranda of Understanding (MOU), OLBD monitors the use of LSDBEs by the District's "economic development project partners." The latter are entities participating in the District's Industrial Revenue Bond Program and the District's Tax Increment Financing (TIF) Program. They execute an MOU pledging their "best efforts" to provide LSDBEs contracting opportunities in an amount equal to 35 percent of the value of the bond proceeds or project costs. OLBD monitors MOUs through review of quarterly reports submitted by project partners.

An Historical Perspective of the LSDBE Program

The District of Columbia Minority Contracting Act was originally enacted by the City Council in March 1977, as DC Law 1-95, 23 DCR 953 2(b). The Act established a goal of 25 percent of the dollar value of all District construction contracts and goods and services other than construction to local minority business enterprises. In 1980 and 1983, the City Council expanded the ethnic group eligibility to participate in the program and increased the utilization goal from 25 percent to 35 percent.

In January 1989, in the case of the City of Richmond v. J.A. Croson Co., 488U.S. 469 (1989), the Supreme Court ruled that the City of Richmond's minority business enterprise set-aside program was unconstitutional. This decision forced many states to review and/or, in many cases, revise or suspend their race-based set-aside programs. In order to meet the "strict scrutiny" standards imposed under the Croson decision, many states, and the District of Columbia, conducted extensive Discrimination Studies. The District's study documented the historical under-utilization of minority-owned businesses to determine if a disparity existed between the availability of minority-owned businesses in the District's market and their utilization in the District's contracting activities.

The U.S. Court of Appeals suspended the District's sheltered-market program in June 1992, following a decision of the District of Columbia Circuit in O'Donnell v. the District of Columbia. Following the logic of the Croson decision, the Court of Appeals found that:

- ◆ The District's 35 percent goal operated as an inflexible requirement.
- ◆ The District's adoption of the Act was based on "general allegations of discrimination rather than on relevant and statistical findings of disparity.
- ◆ The District developed "no strong basis in evidence" for setting its minority contracting goal at 35 percent.

Following the completion of the District's Discrimination Study in 1992, DC Law 12-268 "Equal Opportunity for Local, Small, and Disadvantaged Business Enterprise Act was enacted by the City Council. Under this Law, each agency of the District, among other things, shall:

- ◆ Allocate its construction contracts in order to reach a goal of 50 percent of the dollar volume of all construction contracts to small businesses.
- ◆ Allocate its procurement of goods and services, other than construction, in order to reach a goals of 50 percent of the dollar volume to small business enterprises.
- ◆ Allocate 5 percent of its contracts to prime contractors who agree to subcontract a portion of the contract work with local or disadvantaged businesses.

DC Law 12-268 also provides for a bid preference mechanism; a separate set-aside program for small business enterprises; a set-aside program for local, small and disadvantaged businesses at the sub-contracting level; and a set-aside program for local, small and disadvantaged businesses for the “Blanket Order Blitz” program.

Despite the fact that 10 years have passed since the District’s race-based set-aside program was found unconstitutional by the Courts, many people continue to believe that minority set-asides should remain in the District of Columbia. In fact, the District’s own Discrimination Study revealed that there was disparity in certain areas of contracting with minority-owned businesses, leading many people to believe that the District would be able to meet the strict scrutiny standards imposed in the Croson decision. Other areas of marketplace contracting, however, revealed “over-utilization” based on the availability of minority business enterprises in the marketplace. Despite these findings, the District opted not to continue with a revised race-based program to replace the original Minority Contracting Act DC 1-95, but instead to develop a race neutral program to promote DC-based businesses, small businesses and businesses whose owners had or currently suffered from economic and social disadvantages.

3.0 Identification, Analysis And Validation

During discussions relating to the effectiveness of the District’s monitoring and enforcement efforts, a number of stakeholders raised concerns about whether the District is aggressively enforcing MOU requirements. That concern is heightened when one considers the amount of potential business for LSDBEs that exists within the scope of projects covered by MOUs. While the Subgroup did not examine the extent to which this particular enforcement activity was more aggressively pursued than others, our recommendations for improved monitoring and enforcement are intended to include enforcement of MOU commitments.

As a result of the significant amount of research and data collected by the Task Force, we conclude that having a race and gender-neutral program is not seen as a major barrier. Rather the lack of compliance and enforcement of the legislation and policies set forth in DC Law 12-268, The “Equal Opportunity for Local, Small and Disadvantaged Business Enterprise Act of 1998” is considered the hurdle to the effectiveness of the LSDBE program.

3.1 Improved Systems are Key to Enhancing Reporting

Amongst all the areas of study by the Task Force; the issue of systems, measurement, reporting, and monitoring received significant attention. In each of the Subgroup’s area of focus, each issue led back to systems problems, i.e. procurement, communications, tracking, monitoring, and reporting systems. Each Subgroup identified significant gaps in the existing systems’ capabilities; inhibiting, in many cases the City’s ability to effectively communicate its program successes. The three District agencies most involved in the LSDBE procurement supply chain – the Office of Local Business Development (OLBD), the Office of Contracting

and Procurement (OCP), and the Office of the Chief Financial Officer; all rely on incompatible computer systems. As such, OLBD is unable to develop credible, meaningful, verifiable compliance reports that could otherwise lead to improving public perception concerning the LSDBE program.

3.2 Current OLBD Compliance and Enforcement Activities

A description of the structure that is used to implement compliance and enforcement of DC Law 12-268 follows. It should be noted that a number of stakeholders have questioned the extent to which the process outlined below is rigorously followed. Thus, what is described may not mirror actual practice or stakeholder perception of actual practice. Nonetheless, the Subgroup has examined the basic structure and, absent any evidence to the contrary, has assumed that it is being followed. Our recommendations are intended to improve the effectiveness of this basic structure.

The Director of OLBD has the responsibility and authority to carry out the functions assigned to the Office. With regard to agency compliance with LSDBE regulations, the Director is responsible for the:

review [of] the procurement plans of each agency of the District government and determine[ing] . . . which contracts, or parts thereof, shall be reserved . . . so that agency's failing may be timely remedied . . . reviewing agency plans and taking appropriate action . . . and monitoring agency compliance with LSDBE requirements.

The other officials involved in the process of ensuring agency compliance with LSDBE regulations are agency directors and the Office of Contracting and Procurement (OCP).

Because agency directors have limited contracting authority, responsibility for meeting LSDBE goals does not solely rest with them. Agency directors and OCP share this responsibility. They jointly decide the goal and the ways in which the goal is to be reached.

3.3 Forecasts and Report Content

To facilitate monitoring the compliance of District agencies, OLBD requires District agencies to submit quarterly reports to the OLBD detailing each agency's expenditures with LSDBEs. The reports provide information regarding how much each agency has expended with respect to LSDBEs. These expenditure reports must then be compiled and submitted to the Office of the Mayor and the Council of the District of Columbia at the end of each fiscal quarter.

A list of the compliance reports that OLBD requires the agencies to submit are presented below:

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- ◆ Annual Allocation Letter (Form OLBD/CE #1) – This document functions as both a worksheet for each agency to determine the amount of its budget that will be set aside for compliance with DC Law 12-268 and as documentation of the agency director’s awareness of the agency’s actual obligation under the law for the fiscal year. Specifically, the annual allocation letter provides the agency’s: 1) appropriated budget for the fiscal year, 2) operating expenses, 3) expendable budget, and 4) the amount reserved for the set-aside target to be utilized with LSDBEs. The agency director is required to sign the letter.
 - ◆ Operating Expense Checklist (Form OLBD/CE #2) – This document provides an easy way for the agencies to determine their annual operating expenses. Agencies are required to enter the amount of those non-discretionary operating expenses by object code. (The form lists the object codes so that only dollar amounts need to be entered.) The purpose of having the agencies record the amount of their non-discretionary operating expenses by object code is to reflect those operating expenses, which because of the nature of the expense, should not be part of the agency’s discretionary expendable budget. The form also allows for adjustments (where object codes have to be entered as well as dollar amounts) for annual expenses not listed on the checklist and requires documentation explaining why the additional amounts are non-discretionary expenses for the agency.
 - ◆ Expenditure Procurement Projection Report (Form OLBD/CE #3) – This document works as an outline for how an agency intends to meet its LSDBE set-aside requirement. (This is the document that is referred to in the data gathering transcripts and notes as forecasts.) Agencies are required to list:
 - The object code number
 - A description of the expenditure
 - The estimated annual expenditure for the fiscal year
 - The projected quarterly expenditure
 - The market that the agency plans to utilize (e.g. LSDBE, Small Business Set-Aside, Open Market, etc.)
 - The type of service for each item of expenditure that the agency projects to spend for the entire fiscal year

Quarterly Contract Award/Purchaser Report (Form OLBD/CE #4) – This document serves as OLBD’s monitoring device for evaluating an agency’s performance relative to meeting the LSDBE requirement throughout the fiscal year. Agencies are required to provide a detailed list of all purchases made by the agency in the quarter. This includes:

- ◆ Vendor name
 - ◆ Contract award/purchase order (PO) number
 - ◆ Contract award/PO amount
 - ◆ Contract award/PO date
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- ◆ Payment amount
 - ◆ Payment date, description of service
 - ◆ An indication of whether or not an LSDBE was the vendor

In the beginning of the fiscal year, each agency submits an estimate of its LSDBE expenditure goal for the year to OLBD. The Expenditure Procurement Projection Report serves as the documentation for forecasts. Agencies should achieve 25% of their goal each quarter. The first annual forecast is actually submitted at the end of the first quarter because of the delay in approval of the District's budget by the U.S. Congress.

Agencies submit quarterly reports to the Director of OLBD. Agency reports are prepared by the agency Chief Contracting Officer and the agency's Chief Financial Officer (CFO) or the CFO's designee. Agency directors sign off on the reports before they are submitted to the Cluster Relations Manager in OCP and the OLBD Director.

Shortfalls are addressed upon review of quarterly contract award/purchaser reports. If the Director of OLBD finds a shortfall in an agency's report, the Director first calls the agency's chief contracting officer to discuss a plan to resolve the problem and to find out if the agency has a plan for making up the shortfall in the next quarter. When the OLBD Director and the agency's Chief Contracting Officer cannot reach a consensus on how to make up the shortfall, OLBD transmits a letter to the agency requiring the agency to double its LSDBE expenditures in the next quarter in order to meet its LSDBE goal.

OCP also monitors an agency's progress toward meeting its annual LSDBE goal. Specifically, the Business Development and Contract Compliance Officer in OCP reviews each agency's goals achievement on a quarterly basis. If an agency is short of its goal, the Officer projects the possibility of reaching the goal in the future. If appropriate, OCP also transmits a letter to the agency concerning the need for the agency to double its next quarter's LSDBE expenditures to meet its annual LSDBE goal.

3.4 Agency Compliance

At the January 31, 2002 hearing before the Committee on Government Operations, OLBD reported that for the first time since the inception of the LSDBE program, 32 agencies met their individual LSDBE goals. While the Office was proud of this achievement, staff acknowledged that there is opportunity for improvement because 19 agencies did not meet their goals.

The Chief of Procurement, at this same hearing, advised those in attendance that during FY2001, OCP's expendable budget was \$1,370,796.00 and its annual LSDBE goal was \$685,398.00. The actual contract dollars spent by OCP with LSDBEs totaled \$866,032.90. While the agency was able to meet its FY 2001 goal, the fact is that the LSDBE community

should be able to generate more business to obtain more of the expendable budget. It is also evident from OLBD reports of contracts awarded and comments from LSBDEs at the town meetings that contracts awarded are not spread throughout the entire LSDBE community. There is a perception that contracts tend to go to those businesses that have learned how to manipulate the system.

There is no question that the current Director and staff have made significant improvements. However, the Director and the overwhelming majority of participants in the Focus Groups stated that much more needs to be done.

The District of Columbia, in its attempt to adhere to the rulings in the Croson and O'Donnell cases, implemented rules and regulations regarding women and minority programs, and established the 1992 Equal Opportunity for Local, Small and Disadvantaged Business Enterprises Act. The creation of this law enabled large local companies to compete against small and disadvantaged companies, thus creating a significant barrier of entry for the truly small business enterprise.

Among the LSDBE program stakeholders interviewed, private developers questioned, "What does 'local mean?'" They know that local does not necessarily mean small; therefore, the government may not be meeting what they think is the mission of the program. Moreover, the focus group data reveals that agency directors, procurement officers, and LSBDEs have an overall lack of understanding concerning what the program is specifically trying to accomplish. These stakeholders stated that even the program's very name – Local, Small and Disadvantaged Businesses – creates differing interpretations and confusion.

It is the view of the Compliance and Enforcement Subgroup that eligibility and size standards should be revised to ensure that the local small business enterprises do not have to compete against the larger, well-established companies in their respective work classifications.

4.0 Models for Comparison

In examining other state and local protected class business programs in other jurisdictions, the Subgroup questions whether or not some jurisdictions continued to, despite the Court's decisions, administer race or gender-based set-aside programs. Further, the Subgroup compared various program aspects, including utilization goals and program enforcement mechanisms, used by other jurisdictions. (See Exhibit 4.1.)

Exhibit 4.1 – Comparison of Best Practices: Compliance and Enforcement

Baltimore, Maryland Minority/Women's Business Enterprise (Ordinance 211/Mayor's EO)	Chicago, Illinois Minority and Women-Owned Business Procurement Program (Municipal Purchasing Act, 65)	Florida State Minority Business Enterprise "One Florida Initiative" (EO 99-281/Chapter 94-322)	Philadelphia, Pennsylvania The Minority Business Enterprise Council (EO 1-93)
<ul style="list-style-type: none"> Previous program struck down by lawsuit. 1999 Disparity Study revealed disparity among minority groups and women. 	<ul style="list-style-type: none"> Conducted disparity study after Croson Case. New ordinance passed in 1990 to comply with court ruling. There were a lot of challenges initially from prime contractors. In 2000, the Ordinance was amended to allow the Office to monetarily penalize contractors when underrepresented groups are not utilized. 	<ul style="list-style-type: none"> Conducted disparity study. Current program meets the Court's requirement to be race neutral by eliminating preference points. The Governor's EO is the mandate; no legislation governs the process. The next Governor could do away with the program. 	<ul style="list-style-type: none"> Results of disparity study conducted three years ago have yet to be released. Groups challenged old "Office of Minority Opportunities" program and the new one, but they continue to operate under the current Executive Order. They use EEO data for leverage and emphasize the need for inclusion in awarding contracts.
Model			
<ul style="list-style-type: none"> The current program is race and gender-based Participation Goal: 35 % to all minority and women-owned businesses. Annual goals are set for each agency based on availability of businesses vs. total number of certified companies. Size standards are currently being developed. Anticipate that they will follow SBA standards. 	<ul style="list-style-type: none"> Participation Goal: 25% minority and 5% women for Conventional Program Participation Goal: 16.9 % minority and 4.5% women for Target Market Program, which is designed to have proven companies compete against each other. Primes cannot compete in program. 10% of overall City budget is set-aside for this program. Currently being challenged, but has not gone to court yet. 	<ul style="list-style-type: none"> They do not have goals, participation ranges or points. Anyone bidding on a contract, including large minority firms must have a diversity plan. A mandatory registration system is used to capturing the total extent of minority business spending across agencies. Success is measured against total dollars actually spent against available dollars. Awarding of contracts is based on past participation and performance. 	<ul style="list-style-type: none"> The current program is race and gender-based and includes all minority classes, the disadvantaged, women and the disabled. Participation range is used, but the range is not set or stated. The range is based on bidder's ability to perform. Bidders must already be certified at bid opening to be considered. An economically disadvantaged business is defined as personal net worth being less than \$750K. The goal is to move small businesses to status of prime.
Compliance and Enforcement			
<ul style="list-style-type: none"> All contracts (1500-2000) of \$25K or more are reviewed by the office. An agency can ask for waiver of goal for sole source contracts, but this is kept to a minimum. There is a constant monitoring of all contracts to ensure goals are being achieved. If a contractor repeatedly fails to meet goals, the City must be reimbursed its money. Agency directors are required to report progress on an ongoing basis. If Agency misses commitment, dollars are taken out of the budget. Conducts job-site visits to ensure prime and subcontractors are in compliance. Requires all invoices, canceled checks, time records, and receipts upon completion of contract. Procurement is centralized for more control. 	<ul style="list-style-type: none"> Every contract is reviewed and bidders must submit a Compliance Plan. Agencies are responsible for monitoring; if not in compliance, the contract cannot be awarded. A portion of monies is held in retainage on all contracts so final payment can be penalized if commitment is missed. In conjunction with these programs, they have a residence requirement that 50% of all hours must be worked by residents of Chicago or monetarily penalized. Size standard is \$27 million for all contracts averaged over a 3-year period. Conducts job-site visits to ensure prime and subcontractors are in compliance. Requires all invoices, canceled checks, time records and receipts upon completion of contract. Procurement is centralized for more control. 	<ul style="list-style-type: none"> Mandates all agencies to submit contracts over \$75K for bid review. Bidders must adhere to diversity plan, which is reviewed by both the office and agency. Ongoing monitoring and monthly audits are performed by the Governor's Office to compare current spending against previous month and previous year spending. Actual dollars spent are tracked. All department heads are evaluated on their achievement. Roundtable meetings are held monthly to ensure that companies understand the Diversity Plan and expectations. Procurement is decentralized. 	<ul style="list-style-type: none"> Every contract over \$50K is reviewed to determine if participation range is achievable. Each bidder must submit a binding agreement form, "Solicitation for Participation and Commitment Form." Bids are ranked according to compliance. A bid is rejected if a bidder is not responsive to participation range. Payment is withheld if it is determined that contractor is not in compliance. If a project is delayed, agency is responsible for notifying office of start-up so monitoring can begin. Conducts job site visits to ensure prime and subcontractors are in compliance. Requires all invoices, canceled checks, time records, and receipts upon completion of contract. Procurement is centralized for more control.

5.0 Recommendations:

Revise LSDBE Program Eligibility Standards

- ◆ Establish a two-tier system that distinguishes program incentives for large local businesses from small local businesses.
- ◆ Set aside 50% of agency discretionary procurement for small local businesses only (Tier 2).
- ◆ Increase revenue ceilings from current levels to \$35 million for small local businesses.
- ◆ Increase asset totals for community financial institutions to \$500 million.
- ◆ Increase "micro-business" revenue limit to \$2 million.

Establish Enhanced Compliance and Enforcement Standards

- ◆ Include a liquidated damages provision, if permitted, in all future Industrial Revenue Bond (IRB) contracts for failure to meet LSDBE participation requirements involving District procurement activity and in all MOUs executed in connection with the District bond activity. The OLBD, OCP, and contracting officers should consult with the Office of the Corporation Counsel and, where appropriate, immediately recommend to that office the enforcement of liquidated damage provisions in existing contracts where the prime contractor has failed to comply with LSDBE participation requirements.
- ◆ Enforcement tools of the Department of Consumer and Regulatory Affairs, such as the cancellation of construction permits, should be utilized to ensure compliance with LSDBE participation requirements.
- ◆ The District should contract with an organization to monitor private-sector contractor compliance with District LSDBE participation requirements. The contractor should have expertise in the construction industry in order to assist the government in identifying potential compliance issues and LSDBE contracting opportunities. The contractor should be provided with, among other things, authority for random job-site visits, review of contractor documents (including time sheets and invoices), and access to subcontractor documents and records. The entity should be given the broadest mandate and all contractors with the District should be under a contractual obligation to fully cooperate with the entity.
- ◆ Support the provision contained in Bill 14-548 introduced by Councilmember Harold Brazil (Bill 14-548) that both the OLBD and the OCP be subjected to periodic independent evaluations of their actions in approving agency goals and ensuring agency compliance with outstanding requirements for LSDBE participation.